

**MOHAMED BIN ISMAIL v. TAN SRI HAJI
OSMAN SAAT & ORS.**[O.C.J. (Wan Yahya J.) September 20, 1981]
[Johore Bahru – Originating Motion No. 26 of 1980]

Administrative Law – Application for land by applicant and others – Alienation of state land to Mentri Besar and others – Motion by applicants against Commissioner of Lands and Mines, Johore Government and Mentri Besar – Allegation of contravention of State Constitution – Facts disclosing possible offence of corrupt practice – Motion by respondent to strike out proceedings – Whether applicants have locus standi – Affidavit by Commissioner of Lands and Mines – Application to cross-examine Commissioner of Lands and Mines and Mentri Besar on affidavit – Emergency (Essential Powers) Ordinance, 1970 – Constitution of Johore, 2nd Part, art. IV(9).

Practice & Procedure – Commencement whether by writ or motion – Proceeding irregular but not void – Failure to intitle motion – Irregularity – Specific Relief Act, 1950, (Act 137) s. 41 – R.H.C. 1980, O.2, 0.8 r.3, 0.53, 0.92 r. 4.

In this case the applicant and 183 others had applied for state land in Mersing, Johore. No reply was given for over eight years. Subsequently the applicant found from a search in the Land Registry that a number of pieces of land in the area had been alienated to the 1st respondent the Mentri Besar of Johore, and other dignitaries. The applicant alleged that the alienation process was carried out in the Executive Council in the presence and with the participation of the 1st respondent and four other Executive Council members. It was alleged that approval was given for the alienation of land to themselves and other dignitaries. The applicant took out a motion against the Commissioner of Lands and Mines, the Johore Government and the first respondent. Subsequently the 1st respondent filed a motion to strike out the proceedings and to expunge the affidavit of the applicant. The only affidavit in support of the motion was one sworn by the second respondent, the Commissioner of Lands and Mines. The affidavit in effect challenged the *locus standi* of the applicant to the relief claimed on the ground that he had not sufficient interest in the matter. The affidavit further alleged that the procedure adopted was wrong in law. The applicant filed a motion for leave to cross-examine the deponent of the affidavit and the 1st respondent.

Held: (1) although the procedure adopted by the applicant by motion instead of by writ was wrong it merely rendered the proceedings irregular but by no means void. The court may, if it is satisfied that the parties, their counsel and the court will not be seriously embarrassed by the irregularity and that such irregularity will not lead to injustice in any party, proceed to hear and determine the case;

(2) although the applicant had failed to intitle his motion and therefore not complied with the form prescribed under Order 8 rule 3 of the Rules of the High Court, the respondents were not embarrassed or prejudiced by the slight omission. The court would therefore invoke the powers and exercise the discretion under Order 2 and Order 92 rule 4 of the Rules of the High Court to rule the motion to proceed and be considered on its merits. The applicant in this case was clearly proceeding under section 41 of the Specific Relief Act as an adjunct to prerogative remedies;

(3) the applicant had *locus standi* in this case as he was an aggrieved person and had sufficient interest in the matter;

(4) Order 38 rule 2(3) of the Rules of the High Court does not empower the court to order the attendance for cross-examination of persons other than the deponents. The application to cross-examine the 1st respondent must therefore be refused, but the 2nd respondent will be ordered to attend and be cross-examined.

[Editorial Note: The 1st respondent appealed to the Federal Court (F.C.C.A. 187/81, Raja Azlan Shah C.J. (Malaya), Wan Suleiman F.J. & Abdoolcader, May 25, 1982). The appeal was dismissed. The judgment of the Federal Court will be reported in the next issue.]

A Cases referred to:

- (1) *Haji Ismail bin Che Chik v. The State Commissioner, Penang* [1975] 1 M.L.J. 271.
- (2) *Sungai Wangi Estate v. Uri* [1975] 1 M.L.J. 136.
- (3) *Merricks & Anor v. Nott Bower and Anor.* [1964] 1 All E.R. 717.
- (4) *Gouriet and others v. Union of Post Office Workers* [1978] A.C. 435.
- (5) *R.v. Inland Revenue Commissioner's* [1980] 2 All E.R. 378.
- (6) *Kuluwante v. Government of Malaysia* [1978] 1 M.L.J. 92.
- (7) *District Council Central Province Wellesley v. Yegappan* [1966] 2 M.L.J. 177.
- (8) *Schmidt v. Secretary of State Home Affairs* [1969] 2 Ch. 149.
- (9) *Attorney-General of the Gambia v. N'Jie* [1961] 2 All E.R. 504, 511.
- (10) *R.v. Greater London Council, ex parte Blackburn* [1976] 3 All E.R. 184, 192.

C**ORIGINATING MOTION.**

G.S. Nijar (Abdul Razak Ahmad with him) for the applicant.

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C.K.G. Pillay (Dato' Hassan bin Haji Yunos with him) for the 1st respondent.

Alauddin bin Mohamed Shariff, Legal Adviser, Johore, for the 2nd and 3rd respondents.

Cur. Adv. Vult.

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Wan Yahya J.: On May 27, 1972 the Applicant and 183 others made application for State land in Mersing. Their names were submitted by the District Officer, Mersing to the proper authorities. For over eight years the Applicant waited in vain and up till the date of this Application no answer came from the appropriate authorities. The Applicant then made a search in the land registry and found that seven pieces of State land in that area had already been alienated to the 1st Respondent, the Mentri Besar of Johore, and a few other dignitaries, whom the Applicant's Counsel conceded before this court have been unfortunately described as his cronies. The Applicant alleges in his affidavit that the alienation process was carried out in the Exco in the presence and with the participation of the 1st Respondent and four other Exco members. These gentlemen, it was alleged, approved various parcels of land to themselves as well as dignitaries of no less importance, ranking from a former Exco member to a Deputy Minister and a few Cabinet Ministers. He was understandably aggrieved by this decision, which he felt had not only jeopardized his right as an applicant for the land but also by the unlawful act of the 1st Respondent. So on December 23, 1980 he took out a Motion against both the Commissioner of Lands & Mines, the Johore Government and the 1st Respondent, who was and still remains as the Mentri Besar of Johore.

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The Respondents did not respond to the allegations in the Motion until 5 days before the date of hearing when the 1st Respondent alone filed a Motion to strike out the proceedings and to expunge the affidavit of the Applicant from the record of proceedings. The only affidavit in support of the Motion appears to be one sworn by the 2nd Respondent. In this affidavit the Commissioner of Lands & Mines, Johore, deposed that he was authorized by the 1st and 3rd Respondents to make an affidavit on their behalf but neither of the 2nd or 3rd Respondents filed a Motion to strike

out the proceedings. This affidavit in effect challenged the *locus standi* of the Applicant to the relief prayed on the ground that he had not sufficient interest in the matter. This allegation of insufficient interest appears to be based on the fact that the Applicant made no formal application but his name was merely one of the 184 names given for consideration for a fishermen's settlement scheme, that the matter was still being administratively dealt with and that the alienation of the land to the Mentri Besar and nine others did not prejudice the Applicant's chance as there were vast unallotted lands still available in that area. The affidavit further alleges that the procedure adopted was wrong in law.

The Applicant immediately filed a Motion for leave to cross-examine the deponent, Dato' Haji Abdul Kadir bin Sam'on and the 1st Respondent.

The hearing before this court was therefore confined to the two Motions to strike out and to cross-examine.

On the question of procedure it was submitted that this action should have been by a writ and not by a motion and that on the authorities of *Haji Ismail bin Che Chik v. The State Commissioner, Penang*⁽¹⁾ and *Sungai Wangi Estate v. Uni*⁽²⁾, the court should dismiss the application. In my opinion, both these cases are not proper propositions for dismissing a suit for irregular procedure. Although in both these cases the court commented that the mode adopted by the applicants was inappropriate, it nevertheless went on to consider and determine each case on its merits. To my mind the procedure adopted by the Applicant merely rendered the proceedings irregular but by no means void. In such a case, the court may, if it is satisfied that the parties, their Counsel and the court will not be seriously embarrassed by the irregularity and that such irregularity will not lead to injustice to any party, proceed to hear and determine the case. This point was discussed at page 272 of *Haji Ismail's* case (*supra*) wherein Chang Min Tat J. (as he then was) said at p.272:

"All in all, it does appear to me that there is considerable substance in the contention of the learned Legal Adviser. On the other hand, however, there cannot be any serious embarrassment to the parties or their counsel in presenting their contentions or to the court in hearing the case and coming to a decision. No disputes of facts arise and the matter stands to be decided on a consideration whether there are powers to make the subsidiary legislation providing for an increased rental in the case of land hitherto held under a statutory land grant. For myself, if, in a summons for directions, any application was made in an action commenced by writ for similar reliefs for an order to try the action as on a motion, I would not have expected objection from the respondent and I would not myself have hesitated to make the order."

On the question of procedure an objection was further raised by the 1st Respondent on the failure of the Applicant to intitle his Motion. It was submitted that this amounted to non-compliance with the form prescribed under O.8 r.3 and that in turn it had left the Respondent in the dark as to the legal nature of the relief claimed, i.e., whether it is under section 41 or 42 of the Specific Relief Act, or under O.53 of the Rules of the High Court, or under Judicial Review. The answer to this, as provided at the hearing itself, is that the Applicant is proceeding under section 41 of the Specific Relief Act as an adjunct to prerogative remedies.

The question for my immediate consideration however

A is whether the Respondents were truly embarrassed, or in any way prejudiced by this slight omission. My view is that they were not. If by any chance they were, they could have taken out summons for directions or they could have, after hearing the Applicant's case, asked for an adjournment to prepare the reply. The Respondents did neither of these but merely chose to raise this only at the hearing. The eloquence and thoroughness with which Mr. C.K.G. Pillay, Counsel for the 1st Respondent, addressed the court and the contents of his written submission indicate anything but lack of preparedness and appreciation of the claim they were faced with.

C I am of the view that this is a proper case to invoke the powers and exercise my discretion under O.2 and O.92 r.4 of the Rules of the High Court and to rule the motion to proceed and be considered on its merits. Moreover the Applicant had an arguable issue to be tried. (See *Merricks & Anor v. Nott Bower & Anor*.⁽³⁾).

D The next and by far the most serious contention of the Respondents in their application to strike out is the question of *locus standi* of the Applicant. Mr. Pillay, reading from *de Smith's* "Judicial Review of Administrative Action", pointed out that for a declaration to be properly made there should be controversy between the parties involving the claimant's legally recognised interests and that the court's intervention through the granting of declarations had been confined to 'immediate personal interest', or 'proprietary interest'. Counsel further contends that, although the trend propounded by Lord Denning that a wider qualification be given to the term 'interest' was gaining momentum in the English Courts, His Lordship's 'escapades' were cut short by the House of Lords case of *Gouriet and Ors. v. Union of Post Office Workers*⁽⁴⁾. In that case it was held *inter alia* that only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs and that the Courts had no jurisdiction to entertain a claim by a private individual who had suffered and would suffer damage from such public wrong.

G *Gouriet's* case was however distinguished in the subsequent Court of Appeal case of *R.v. Inland Revenue Commissioners*⁽⁵⁾. In this later case it was held that an applicant for judicial review of the action of a public authority need only establish that he had a sufficient interest in the matter.

H Initially this may appear to be in conflict with the House of Lords decision in *Gouriet's* case. But this case is distinguishable if one has in mind that firstly *Gouriet's* case relates to a relator proceeding in respect of a wrong that could constitute a threatened criminal offence that has yet to be committed and secondly Mr *Gouriet's* application for a declaration in that case was unsupported by any assertion of loss or damage by the projected interruption of the postal communication to and from South Africa and thirdly the ruling in *Gouriet's* case can only apply to relator proceedings and not to prerogative writs. The distinguishing factor is dealt with by Lord Denning himself in *R.v. Inland Revenue Commissioners, supra* at page 388 in which His Lordship said:

"At first sight the House of Lords in *Gouriet v. Union of Post Office Workers* [1977] 3 All E.R. 70; [1978] A.C. 435 seem to have slammed the door against ordinary citizens coming to the court,

except one who has suffered a particular damage. But the decision was concerned only with relator actions. Lord Wilberforce pointed out that it did not apply to the prerogative writs such as mandamus or certiorari. He said [1977] 3 All E.R. 70 at 84, [1978] A.C. 435 at 482: 'These are often applied for by individuals and the courts have allowed them liberal access under a generous conception of *locus standi*.' It is these remedies that we are here concerned with. They apply only to public authorities, not to trade unions; so they were not available in *Gouriet's* case."

Then at page 395 of the same case Lawton L.J. expressed the distinguishing factor in the following passage:

"... The courts have come a long way since 1960 in allowing grievances against persons performing public duties and exercising statutory powers to be given a hearing in the courts. The common law was alive to the mischief which was likely to arise if public officers could be sued by anyone with a grievance. Appreciation of this likely mischief resulted in the development of the restrictions imposed by the relator procedure. The restrictions of this procedure do not apply to prerogative orders (see the speech of Lord Wilberforce in *Gouriet v. Union of Post Office Workers* [1977] 3 All E.R. 70; [1978] A.C. 435 and the submission in that case made by counsel for the Attorney General [1978] A.C. 435 at 446)..."

And lastly Ackner L.J. at p. 398:

"Counsel for the Crown contends that the part of the judgment which I have set out above, in which Lord Denning MR recasts the principle which he stated in *McWhirter's* case, was disapproved by Lord Wilberforce in his speech in *Gouriet v. Union of Post Office Workers*. This is undoubtedly correct in so far as Lord Denning MR's observations were directed to relator proceedings. *Gouriet's* case was of course not concerned with the prerogative orders, as to which Lord Wilberforce made this passing observation [1977] 3 All E.R. 70 at 84; [1978] A.C. 435 at 482."

At the earlier hearing before me Counsel for the Respondents did not dispute the applicability of the principle of Judicial Review but contended that the *locus standi* of an applicant for declaration should be subjected to more stricter tests in this country. The case of *Kuluwante v. Government of Malaysia*⁽⁶⁾, where it was held that the applicant to a declaratory decree must establish immediate personal right or interest, and *District Council Central Province Wellesley v. Yegappan*⁽⁷⁾, where it was stated he must have recognised legal rights, were cited in his argument. In my view the Judge in *Kuluwante's* case was not only expressing the term 'right' to include 'interest' but was clearly of the view that some legitimate expectation to such interest is sufficient to entitle an applicant to an action for declaratory judgment. At p. 94 Yusoff J., applying the authority in *Schmidt v. Secretary of State Home Affairs*⁽⁸⁾, said:

"With respect I do not agree with this contention. In an action for a declaratory judgment, the plaintiff has of course to establish her title to sue. She has to establish that she has an immediate personal interest in the subject-matter of the proceedings and in claiming a declaration which relates to legal right, in my opinion, all that she has to establish is that she has some legitimate expectation of such right or interest. In *Schmidt v. Secretary of State, Home Affairs*, Lord Denning, in relation to the right of hearing in a declaratory action by an alien, said:

"It all depends on whether he has some right or interest, or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

The circumstances of the present case show that both the plaintiff's parents, brothers and sisters are federal citizens and for that reason she has a legitimate expectation to citizenship and, in my view, she cannot be debarred to have access to this court by reason only that she is not a citizen. For the purpose of this claim for declaration, I hold that the plaintiff has the requisite *locus standi*."

A The case of *District Council Central Province Wellesley v. Yegappan supra* is distinguishable from the present one. In that case the Federal Court held that the applicant's mere dissatisfaction with the approval of the planning authorities does not constitute a wrongful deprivation of his rights and therefore does not place him within the category of 'a person aggrieved'. The Federal Court therefore held that his interest was too remote. In the course of delivering the Court's judgment, however, Abdul Aziz J. went on to say that the applicant will have his legal rights if the act complained of is done in contravention of the law. Page 182 of the judgment reads:

B "Certiorari is not available in vindicating mental or sentimental injury. The fact that his neighbour's backyard will face his (the objector's) front lawn or his sitting room is naturally a matter of interest or, to put it a bit higher, a matter of grave concern to him. But that does not give him a legal right to object. He will have legal right to object and, therefore, *locus standi* if the adjoining buildings are going to be put up in contravention of the law and the breach of its nature would materially affect his legal right. The existence or otherwise of this element called legal right depends upon the facts of each case and the burden is on the objector to show that his proprietary rights have been injured..." (My emphasis.)

C In the present application it is the Applicant's contention that the land was unlawfully given to Tan Sri Othman Saat in contravention of Article IV (9) of the Second Part of the Johore State Constitution. I agree with Mr. C.K.G. Pillay, Counsel for the 1st Respondent, that the facts available in the Applicant's affidavit alone appear insufficient to constitute actual contravention of that provision in the State Constitution, but, to my mind, the facts disclosed therein, remaining unrefuted as they now stand, may constitute an offence of corrupt practice under the Emergency (Essential Powers) Ordinance, No. 22 of 1970, which is nevertheless an unlawful, if not a criminal, act.

D What kind of interest must an applicant have before he can move the courts into declaring a wrongful act of a State authority? The more recent cases show that he can do so in an application for judicial review by showing that he has sufficient interest in the matter. In the case of *R. v. Inland Revenue Commissioners, supra*, it was described as any person aggrieved by the failure of a public authority to do its duty. In that case the court cited with approval the following passages from *Attorney-General of the Gambia v. N'Jie*⁽⁹⁾:

E "The words 'person aggrieved' are of wide import, and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because something has been done or omitted to be done contrary to what the law requires."

F In the same case Lord Denning M.R. reiterated what he had propounded in *R. v. Greater London Council, ex parte Blackburn*⁽¹⁰⁾:

G "I regard it as a matter of high constitutional principle that, if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."

Further down the judgment Ackner L.J. opined. "I cannot see any logical distinction between the position of a ratepayer who can reasonably assert that he has a genuine grievance if there is unfairness between his assessment and that of others in the same rating area, whether or not his pocket is affected, and the position of a taxpayer who can reasonably assert that his sense of justice or fairness is offended by the unlawful act by the Revenue in allowing his fellow taxpayers not to pay their tax. They have each in common the ability reasonably to assert a genuine grievance and that it seems to me to be 'a sufficient interest' to give them each a *locus standi*."

The facts in this present application show firstly that the applicant had made an application, though not in the formal application form, which was taken up with 183 others and submitted to the Executive Council for consideration. He was therefore entitled to a right to be considered and a formal reply from the Council. At that stage he had acquired an interest in the form of his expectation in respect of his application (see *Kuluwante's* case as discussed earlier). Is he not an "aggrieved person" when his application for the land was ignored for 8 years while large pieces of land in that vicinity were being carved out and allotted to the 1st Respondent as well as other rich and influential dignitaries? True, the allocation to these 9 or 10 persons will not cover the entire eligible land in Mersing, but they do jeopardize the Applicant's chances as there will now be fewer pieces of land for alienation. I would certainly hold that he has an interest.

Even if he is not, he may still stand as a person having sufficient interest in the alienation of the 13,000 sq. ft. of land to the 1st Respondent. The alienation was alleged to have been carried out by the Executive Council in the presence and with the participation and connivance of the 1st Respondent, who is the Mentri Besar. The allegation, if true, constitutes a serious and unlawful act by the State's senior-most member of the administration for which act he may be exposed to both civil and criminal proceedings. In such circumstances the Applicant and indeed every citizen, especially one with expectation for alienation of State land, should be properly construed as a person having sufficient interest in applying for a declaratory decree. In a Government so firmly founded on the principles of justice and the rule of law, the Judiciary cannot idly stand as a silent and stony pillar of democracy. The court, in its role as a public watch dog, is not expected to turn a deaf ear to the prevailing public outcry against corruption and abuse of administrative powers by authorities or their officials, however high in rank. The time has come for public authorities to be compellable to perform their duties constitutionally and, if they transgress any law or constitutional directive, then any public-spirited citizen, even if he has no greater interest than a person having regard for the due observation of the law, may move the courts and the courts may grant him the appropriate legal remedy available at their discretion. Public interests demand that a wider and more liberal construction be given to the class of persons who could qualify as having a right or interest to such a remedy. In our courts the mendicant may in appropriate circumstances challenge the act of a Minister if the exercise of such act appears to be unlawful, or against public interest. I would hold that the English authorities on the subject of 'sufficient interest' in a judicial review equally apply to our courts.

For the above-stated reasons I hold that the Applicant

A in this case has a *locus standi*. There were other issues such as the citing of persons not joined as parties in the application. I shall be dealing with these only after hearing the substantive motion and not in this application to strike out.

The 2nd and 3rd Respondents made an attempt to strike out the motion when the 1st Respondent's motion to strike out came up for hearing. The records of proceedings, however, show no visible sign of any written application having been made by either of them. The motion to strike out proceedings were clearly made by the 1st Respondent alone as evidenced by the Notice of Motion itself, wherein it was stated that the court will be moved by Dato' Haji Hassan Yunos and Mr. C.K.G. Pillay, Counsel for Tan Sri Othman Saat, the 1st Respondent, and also at the bottom where it was disclosed that the motion was filed by the solicitors for the 1st Respondent. Nowhere was it mentioned that the application was made on behalf of the 2nd and 3rd Respondents as well. O.2 r.2 of the Rules of the High Court reads:

D "(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be, made by summons or motion and the grounds of objection must be stated in the summons or notice of motion."

The 2nd and 3rd Respondents' submission does not merit consideration for non-observation of this rule. Filing an irregular application and not filing one at all have two completely different implications. The irregular one may be saved by O.2 r.1 but in a case of an *impromptu* oral application it must necessarily embarrass not only the unprepared applicant, who, until then, had no notion of an application being made to strike out, but also the court. The oral applications made by the 2nd and 3rd Respondents are refused.

There remains one other matter to be considered, i.e., the application by the Applicant for leave to cross-examine the deponent, Dato' Haji Abdul Kadir bin Haji Sam'on, who affirmed the affidavit in reply on his behalf and on behalf of the 1st and 3rd Respondents. Mr. Nijar, Counsel for the Applicant, submitted that there is no rule of the High Court which authorizes one Respondent to file an affidavit for another and that, as only the 1st Respondent could furnish the court with the necessary facts to render his action lawful or otherwise, he should be made available for cross-examination. My own impression of O.38 r.2 (3) is that it does not empower this court to order the attendance for cross-examination of persons other than the deponents. Accordingly there shall be an order for the 2nd Respondent to attend this court and be cross-examined at a subsequent date to be fixed by the Senior Assistant Registrar. The application in respect of the 1st Respondent, Tan Sri Othman Saat, is hereby refused.

I Be it so, the 1st Respondent must be aware of the seriousness of the allegations against him and the implications and consequences of his omission from personally filing an affidavit in reply.

Lastly the application by the 1st Respondent to strike out is hereby refused and the trial in respect of the substantive motion shall be heard.

Order accordingly

Solicitors: Ong Ban Chai & Co.; Hassan Yunos.